SUPREME COURT U. S.
FILED
SEP 27 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 399

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,
Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Opinions Below

The decision of the New York Court of Appeals, affirming the judgment without opinion is reported at 17 N.Y.2d 829. The opinion of the Appellate Term of the New York Supreme Court is reported at 48 Misc.2d 611.

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> "3. Congregates with others on a public street and refuses to move on when ordered by the police;
>
> "4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;"

Questions Presented

Whether Section 722 of the New York Penal Law as applied infringes on petitioners' rights under the First and Fourteenth Amendments of the United States Constitution.

Whether petitioners had fair notice before trial of the scope of the charges against them.

Statement

On a mid-summer afternoon, several hundred persons, including the defendants, inundated Duffy Square, a small islet between bustling Broadway and Seventh Avenue, to protest against the war in Vietnam. Clogging the path-

ways of the Square and spilling into the street, the demonstrators seriously disrupted automobile and pedestrian traffic. Scorning patient pleas of police to disperse, the group defiantly persisted there, perpetuating the obstruction. This refusal to obey the reasonable police commands, clearly constituting disorderly conduct, was, however, merely a prelude to the still greater disruption caused by defendants. When the few officers present summoned additional policemen to help disperse the crowd, defendants erupted into frenzied defiance, hurling the Square into a scene of utter chaos.

Charged with the offense of DISORDERLY CONDUCT (Penal Law §722, subdivisions 2, 3 and 4), petitioners were jointly tried and convicted (IMPELLITTERI, J.) in Criminal Court of the City of New York, County of New York, on October 2, 1964. The next month, on November 18, 1964, petitioners Maher, Laub, Rhoads, Ostrow, Shallit, Copeland and Teahan were sentenced to pay a fine of twenty-five dollars or, in default thereof to serve five days in jail; the remaining petitioners received suspended sentences. On November 14, 1965, the Appellate Term of the Supreme Court, First Department, affirmed the conviction, one Justice dissenting, and subsequently, the case was affirmed unanimously by the New York Court of Appeals.

Petitioners here contend that they were guiltless because their conduct was a constitutionally protected protest meeting. Additionally, they argue that they were not afforded fair notice of the criminal acts charged against them. The claims are totally lacking in merit.

THE EVIDENCE

The People's Case

The scene prior to the police orders to disperse

At about 4 p.m. on Saturday, August 8, 1964, approximately 200 persons were gathered on Duffy Square, a concrete island extending from 46th to 47th Streets between Broadway and Seventh Avenue (Behr 20, 26, Walsh 165, 181, Koopman 210).* Bearing placards, the group loudly chanted "Down with American Imperialism. Stop the war in Vietnam," accompanied by defendant Eckhardt's beating on a large kettle drum; several paper effigies had been set up on a sidewalk portion of the Square by Eckhardt and the defendant Kunis (Behr 25, Koopman 210, 214). Shortly after 4 p.m. the defendants Laub, Luce, Copeland and Maher mounted steps leading to a statue at the northern end of the Square and Laub, through a battery megaphone, addressed the crowd (Behr 20, 26, Koopman 209).

As Laub began to speak, the group "jamming" toward him began "spilling out into the street" (Behr 29, 51, Koopman 213). Automobiles were "veering sharply to the right on Broadway and to the left on Seventh Avenue to avoid" demonstrators in the street—including Eckhardt, Kunis and Kyllingstad—and pedestrians whom the demonstrators, blocking the sidewalks on the Square, had forced into the street (Behr 28-9, Walsh 166, Koopman 213). Thus compelled to walk in the street, pedestrians complained to

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

several police officers present (Behr 43-4). Other "pedestrians couldn't get through the street to the bus stop" on the Square (Walsh 166). On the Broadway and Seventh Avenue sidewalks opposite the Square were approximately 4,000 to 5,000 pedestrians, several thousand stopping to look at the demonstrators (Behr 32, Koopman 211-12, 223).

The orders to disperse and subsequent events

Detective **Fritz Behr** testified that after Laub spoke briefly, introducing the defendant Luce, a police inspector and a police captain approached Laub, Luce, Copeland and Maher at the stairs to the statue (21). The captain informed them that because the demonstration was interfering with pedestrian and vehicular traffic, the meeting would have to be terminated (22-3). Laub then took the megaphone from Luce and told the crowd:

> "The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here" (24).

He then stated that, nevertheless, the demonstration would continue; and he returned the megaphone to Luce who spoke briefly and in turn introduced Copeland (24). Copeland stated that "if everybody stayed there and protested to the utmost, that the police department wouldn't do anything about their meeting" (25).

At this point the police captain again approached Laub, Luce, Copeland and Maher, and repeated his order to disperse (25). Taking the megaphone, Laub again urged the group not to disband (25). The crowd began chanting "Let him speak. Let him speak" (38). The captain signalled

fifteen policemen, including two on horseback, over to the Square (42-3). Behr further testified that the defendant Maher struck one of the horses several times with a rolled-up placard (39).

Patrolman **Henry Campbell** testified that after the captain directed Laub to break up the meeting and Laub urged the crowd to stay, "Then the whole crowd started to run all over the place and they were running in the gutter and on the sidewalks (108-11). Campbell approached Laub on the sidewalk of the Square and told him several times to move on (112-13). Laub refused and was then placed under arrest (113).

Patrolman **Joseph Hines** testified that after the police captain spoke to the defendants at the stairs to the statue, Copeland ran back and forth across the Square with a loudspeaker, calling persons over to him (118-19). He was arrested after he again mounted the steps to the statue and refused to leave the area (119-20).

Patrolman **Donald Walsh** testified that after the police captain told the speakers to break up the meeting, the dedendant Apter began:

> "running from the sidewalk to the street, back and forth, speaking to the crowds, telling them not to obey our orders to get back on the sidewalk and to make openings for pedestrians" (161). Walsh told Apter "Stop telling them this and behave yourself" whereupon Apter ran out in the street, yelling to the crowd "Stay where you are" (162-3).

Placed under arrest, Apter threw himself down on the Square and screamed "brutality, fascist police" (163). As

the officer attempted to get him up, the defendants Teahan and Martin intervened, pulling on Apter and shouting "Police gestapo" (164-5). Told to move on, Teahan and Martin refused, whereupon they were placed under arrest (165).

Detective **Francis Koopman** and Patrolman **Robert Annitto** both testified that after the speakers were ordered to break up the meeting, Maher began running around the Square waving a placard, and when mounted policemen arrived on the scene, Maher attempted to move one of the horses by striking it with a placard (190, 215). Annitto testified that the officer kept the horse under control (191), while Koopman stated that the horse reared up on its hind legs when struck (219-20). Annitto also testified that he observed the defendant Turner standing on the sidewalk in front of two policemen, "trying to keep them" from bringing another of the defendants into a police car (192). Turner was hollering "Leave them alone" and "fascist police" (191-3).

Patrolman **George Knoll** testified that he approached the defendants Gelles and Turner and a third person who were standing close together on the sidewalk of the Square and said, "You fellows can't stand here. You are blocking the roadway and * * * the pathway" (141, 145). Gelles yelled, "Oh, you fascist cops. You think you can get everything and do anything you want" (142). Asked twice more to move on, Gelles refused, and was then placed under arrest (142). Moments later, Knoll observed the defendant Kyllingstad on the sidewalk of the Square "in a very loud conversation * * * with a sergeant" (143). She

slapped the sergeant, whereupon Knoll placed her under arrest (144).

Patrolman **Joseph McNulty** testified that after the conversation between the police captain and the speakers, the defendant Meisner began "running around Duffy Square Park calling to others, shouting that they did not have to leave; that they could stay" (82). McNulty approached Meisner on the sidewalk of the Square and told him to move on, whereupon he refused and was placed under arrest (83-4). After the order to disperse, the defendant Jerome, carrying an American flag, began "running from one group to another, calling to members of the group * * *. As the mounted patrolman would dispose a group, the defendant Jerome, with the flag, would run behind the horse and call to others" (84-5). Ordered to move on, Jerome said "no," and was then arrested (85).

Patrolman **Herbert Engelhardt** testified that after the crowd was told to disperse, he observed the defendants Kunis and Chadwick on the sidewalk being told to move on (92, 96, 98-9). Kunis then "ran out into the middle of Broadway and laid down" (98-9). When policemen tried to move Kunis from the street, Chadwick yelled, "Leave him alone, fascists" (92). Again told to move on, Chadwick then sat down on the sidewalk and when an officer attempted to pick her up, she bit him (93). She was then placed in a patrol car (93).

Meanwhile, the defendant Shallit was moving all over the area shouting, "Do not leave here * * * Come back. We have our rights. Don't give in to the police. They are

fascists they have no rights" (93-4). The witness briefly lost sight of her then "saw her again in front of about five people. She was actually doing most of the shoving and pushing back at * * * police officers trying to move the people back" (94). She was then placed under arrest (94).

Patrolman **Edward I. Fahy** testified that upon observing Kunis standing on the sidewalk of Duffy Square screaming, "fascists, police brutality, gestapo," he told Kunis to leave the area whereupon Kunis "ran out into the middle of Broadway and laid down" in the second lane of traffic (127, 129). Fahy went out to him and told him to get up (127). Kunis "continued to lay there. Traffic was getting backed up" so Fahy, assisted by Patrolman Coffey, carried Kunis' "limp" body into a patrol car (127).

At this point Fahy observed the defendant Eckhardt "lying in the middle of Broadway"—also in the second lane of traffic (128-9). The officer told him that if he did not get up, he would be arrested whereupon Eckhardt threw his arms up and said, "Here I am" (128). Fahy then placed him under arrest (128).

Patrolman **Andrew Coffey** testified that he assisted Patrolman Fahy in arresting Kunis after he had laid down in the street (103). At that time "[T]here was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' " including the defendant Rhoads who was standing on the sidewalk "screaming at the top of his lungs" for five or ten minutes (105-6). Rhoads ran to the statue. Then observing Rhoads run to the statue area of the Square, Coffey followed him and told him to move on

(105). Rhoads refused, the officer repeated his order, Rhoads again refused and was placed under arrest (105). As the officer put Rhoads into a taxicab, assisting the police, the defendant Ostrow came from the Square into the street "yelling 'fascist cop' " and "making a lot of noise" (107). Upon his refusal to be quiet, Ostrow was placed under arrest (107).

The Defense

Phillip Luce testified that he was one of the organizers and leaders of the meeting at Duffy Square (236-8). Somewhere between 100 and 150 people had gathered there. After the introductory speeches a police officer appeared and said that "this is an illegal meeting and has to be stopped immediately. You have no right to hold a meeting in Duffy Square" (242). After the defendant Laub related to the crowd what the police officer had said, they did not move, and Laub continued to speak. Suddenly, two horses rode into the crowd, and the police began arresting those who were gathered on the steps (244).

According to the witness, the group had been absolutely quiet until the police arrived on the scene (257). There had been no diversion or interruption of vehicular traffic, and the entire assembly was in the Square, though it was possible that some people might have been in the street (241-2, 256). Ten thousand leaflets had been printed and distributed around the city, announcing the meeting (318-9).

Joseph Leliveld testified that he is a reporter for the New York Times who had been assigned to cover the meeting at Duffy Square on August 8. When he arrived

shortly before 4 o'clock there was a net-work television car on the scene, but apparently the demonstrators had not yet arrived (282). Then, a group of people with signs arrived and formed into ranks (282). Signs were distributed and leaflets were circulated.

Early in the meeting, at which there were no more than 60 people, Captain McCallister stepped up and asked who had given them permission to hold the meeting in Duffy Square: "And I think his first words were, 'Hold this up. Who is giving you permission?' Something to this effect" (286-7). Using the bullhorn, Laub responded, stating that they did not need permission (288-9). The captain withdrew and after a short while returned, stating that if they did not disperse they would be subject to arrest for disorderly conduct (292). "[A]t that point things got a little out of hand, because a number of people seemed to start making speeches" simultaneously, and "there were a lot of people that were just plain shouting" (292-3, 308-9). When the captain's warnings were not heeded, about a dozen policemen plus two mounted policemen moved into the area and began dispersing the group (294). A majority of the group actually moved out of the area, but about 20 tried to hold their ground. It was this latter group which the police began arresting (294-7, 310-1).

The witness further stated, that although he was not sure, he did not observe any interruption of traffic prior to the arrival of the police on the scene (297-8). Nor did he hear Captain McCallister at any time inform the group that vehicular and pedestrian traffic was being blocked by this demonstration (302-3). He did see a girl hit a police officer with her fists (304).

Albert Maher, a defendant, testified that he had been at Duffy Square to participate in and "speak at a meeting to protest the war being carried on now by the United States in Southeast Asia" (319, 321).

The defendant acknowledged having hit two horses, several times, both with a placard and his hand. He claimed to have done so in order to stop them from going into the crowd (323-4, 326).

Ten thousand leaflets had been sent out to advertise the meeting, and about 100 people were in attendance (329-30). Bullhorns were used to amplify the speakers' voices (330).

Theodore Ostrow, a defendant, testified that he had gone to Duffy Square to attend the meeting (331-2, 335) where about 80 or 100 people had assembled. When he arrived, Miss Shallit handed him a black armband so that he could be identified as a monitor in the demonstration (333). He was to make "sure that the participants in the meeting would stay within the Duffy Square area and would not go into the street; and if any disorders I could handle did break out, I should try to subdue any ruckus or yelling, or what have you" (333-4).

The defendant stated that he was arrested about three or four minutes after the police horses arrived (336). He was maintaining his position in the Square, although moving "to avoid the horses, which were charging in about every direction," when he saw the defendant Miss Kyllingstad being taken half-dragged and half walking" to a patrol car or taxicab (336-7). A personal friend of Miss Kyllingstad, he walked over to the officers and informed

them that she could not be arrested, because she has a young baby (337-8, 341, 342). The officer replied that they would "take care of that later" and the defendant was then shoved backwards towards Duffy Square Park into a group of two or three officers where he was held and then "shoved by them again almost into [his] original position" (338). He was then taken to a taxicab, and placed under arrest (340).

Jeremiah Teahan, a defendant, testified that he had gone to the meeting "to hear what the May 2nd Committee had to say in regard to the foreign policy of the United States in Southeast Asia" (351-2).

Prior to his arrest he had walked to where the defendant Kunis was lying on the ground. The defendants Chadwick and Eckhardt were also there (353). Kunis was carried to a car, where he was joined by Eckhardt (354-5). Teahan "then went down further [and] was pushed away from there by several policemen" (356). Down further, where Copeland was being taken to a squad car, Teahan claimed he was then pushed "out of the way * * * into the street" by Captain McCallister, whereupon a policeman told him to "Get out of the street" (357, 358). Another policeman then pushed him back onto the sidewalk where he stayed until still another policeman asked him what he was doing there. He replied that he was trying to stay away from the horses. "In the confusion, somehow or other, someone pushed" him back into the road, in front of a squad car (358-9). A policeman grabbed him from behind and took him to a taxicab, where the defendants "Key Martin and possibly Apter, had been already along

with Patrolman Walsh" who then "proceeded to punch (Teahan) in the mouth, with two witnesses present" (359).

Key Martin, a defendant, testified that he was at Duffy Square on August 8, "to speak on behalf of Youth Against War and Fascism, at a rally opposing the United States War in Vietnam and opposing what seemed at that time to be the imminent expansion of that war" (366-7).

Because of his concern for his fellow-speakers, Copeland and Meisner, he followed them after they had been led away by the police (367). A minute later, an officer asked if he wanted "to go too" and together with another policeman, took him to a cab (368).

Robert Apter, a defendant, testified that Patrolman Walsh warned him that if he did not move he would be arrested (380, 382). A few seconds later, while he was "urging people to stay there and to re-group and have a peaceful meeting" Patrolman Walsh grabbed him and said, "I told you to move. You are under arrest" (382).

On cross-examination, the defendant acknowledged that he had been running around and screaming, and that after the police would tell people to move on, he would tell them to stay (385-6).

Bruno Eckhardt, a defendant, testified that he attended the meeting in Duffy Square as part of a puppet theatre group (389). Their equipment included a four-head soldier puppet, which was held by two men wearing skull masks, and a big kettle drum, which the defendant played but which he stopped playing when told to by the officer (390).

He had been beating the drum for approximately five minutes in an effort to attract attention (397-8). When his friend Kunis was carried into the patrol car by the police Eckhardt merely followed him, opened the door and sat down next to him (392). It was not until he was in the station house that he learned he was under arrest (391-3).

Joyce Chadwick, a defendant, testified that she is a friend of the defendants Eckhardt and Kunis, and had come to the meeting with them (403-4, 408). She and Kunis were standing on the steps to the south of the statue when the police approached (407). Kunis "walked down, off the steps, onto the sidewalk and sat down on the sidewalk, not in the street" (407).

The defendant acknowledged that she did try to bite Patrolman Engelhardt, but she did not believe she had punched him (410). She further stated that she did nothing after the offiecr told her to move off the steps (412, 416).

Ann Kyllingstad, a defendant, testified that she did strike a police officer on the back. This occurred while the defendant Laub was being placed under arrest (432-6). Several officers had approached her and said "Come on, Miss, if you do not move on you will be arrested" (439).

Arthur Kunis, a defendant, testified that at the time of his arrest he was sitting in the vicinity of the flagpole, on the west side of Duffy Square (418-20). The horses had been "turning in circles around, knocking people all over; and policemen on the horses swinging their clubs at people" (421). Upon witnessing this, the defendant felt that

he "had no other recourse but to sit down and refuse to cooperate." When the police arrived he "went completely limp and laid down" (423). He denied yelling or screaming (430).

Pierre Meisner, a defendant, testified that prior to his arrest he had been shouting (441-6). This occurred during the first speech, by Copeland, and not prior to the arrival of the police (444-5).

William Turner, a defendant, testified that he had been assigned as a monitor at the meeting—at which possibly 100 people were in attendance—to maintain order, allow for pedestrian traffic and keep people out of the street (448-50).

The crowd (including the defendant) had been chanting "Let them speak," apparently determined "to drawn out * * * any further orders" when, after about a minute and a half, the captain left the scene and "suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square" (452-3, 458). The defendant walked up the steps, holding his placard up, saying nothing (453). On several occasions he was moved, but he continued to hold his "placard up to the people to see what I was there for" (454). Finally, he was taken to a car (454-5, 462).

The defendant denied ever screaming "Fascist police" or "Leave her alone" (458).

POINT I

Section 722 of the New York Penal Law as applied does not infringe upon the rights of petitioners under the First and Fourteenth Amendments of the United States Constitution.

Converging on Duffy Square, a small concrete island in New York's busiest intersection, several hundred demonstrators against the Vietnam war clogged the sidewalks and bus stop of the Square and spilled into the street. Automobiles began "veering sharply" (28) to avoid both demonstrators and pedestrians whom the demonstrators had forced into the street. Thus obstructed from the pathways of this slender island refuge at the juncture of the major arteries Broadway and Seventh Avenue, pedestrians complained to several police officers present. At several intervals within a period of ten or fifteen minutes, the officers requested the leaders of the group to disperse the meeting because of the vehicular and pedestrian disturbance. Ignoring these entreaties, the leaders, speaking through megaphones, echoed the police requests and defiantly urged the group to remain; rejoining, the crowd shouted "Let them speak" (38). Meanwhile, several thousand persons collected on the sidewalks of Broadway and Seventh Avenue to view the spectacle on the Square. Finally, their reasonable requests blatantly countermanded, the officers summoned additional policemen to help disperse the crowd.

At this point the defendants precipitated the existing disorder into utter chaos. "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' " (105). Several defendants ran into the

middle of Broadway and laid down, fighting police attempts to get them up. Many, including some with megaphones, ran back and forth across the sidewalks of the Square and into the street urging those heeding the police order to remain, and crying, "fascists, police brutality, gestapo." Some bunched on the sidewalks, adamantly refusing repeated police requests to move on. Others shoved and pushed policemen who were successfully dispersing part of the group, one defendant slapping an officer, another repeatedly striking a mounted horse. As some defendants, already arrested, were being placed in patrol cars, other defendants intervened, gathering on the sidewalk and darting out to the street to rage against the arrests, and in some cases, injecting themselves in the way of the arresting officers.

Unquestionably, defendants' conduct after the police order to disperse constituted disorderly conduct under Penal Law Section 722, subdivision 2:

> "Any person * * * whereby a breach of the peace may be occasioned * * * acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

That subdivision proscribes conduct causing "serious annoyance" [*People* v. *Carcel*, 3 N. Y. 2d 327, 331 (1957); see *People* v. *Perry*, 265 N. Y. 362 (1934); *People* v. *Most*, 171 N. Y. 423 (1902)]. Surely, defendants' tumultuous behavior and its chaotic consequences was of this measure. Furthermore, their brazen acts and conflict with the police threatened even more "serious annoyance" than that actually effected by the time of their arrests.

Seeking to justify their acts after the order to disperse, defendants contend that "they fall within the protection of due process and the First Amendment" because they constituted "reasonable efforts" to resist the unlawful police attempt to break up their lawful meeting (petitioners' brief, p. 17). The logic of this proposition, however, is wholly spurious, for, as the Appellate Term opinion* properly discerned, even "if the order were improper, any and all of the defendants' subsequent conduct" would not be "cloaked with an immunity to arrest" [Appendix, p. 19]. Surely a group's efforts in resisting police orders to disperse do not become protected First Amendment activity because the group had previously been engaged in First Amendment activity. Vietnam demonstrators, as well as

> "[c]ivil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. The cause confers no privilege to break or disregard the law." [*Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965) (concurring opinion, Fortas, J.).]

Defendants' tumultuous, disruptive behavior upon being ordered to disperse may hardly be deemed reasonable resistance, and "like all other persons," their lawless resistance is punishable.

Straining further to avoid the consequences of their anarchic behavior subsequent to the police orders to disperse, defendants contend that due process of law was violated by consideration of appellants' individual acts after their failure to obey the dispersal order because such acts were not charged in the complaint. However, the distinc-

* That opinion is set forth in the Appendix to appellants' brief.

tion defendants attempt to draw between their failure to obey the police order and subsequent acts is specious, for, as the Appellate Term opinion observed, the totality of defendants' conduct "after the order is material and proper in showing the failure to obey it" (Appendix, p. 16). For example, after the order to disperse, some defendants sat down on the sidewalk and some lay down in the street. This conduct in itself was the "failure to obey" the dispersal order which defendants concede is properly charged in the complaint. Defendants' attempt to separate the act of failure to move on and these obstructionist acts is sheer sophistry.

Moreover, the language of the complainant, as the Appellate Term properly noted, fully embraces their behavior after the order to disperse. The complaint states that:

> "The defendants did unlawfully congregate and assemble at the above location [Duffy Square] obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful" (6).

Clearly, defendants had fair notice that all of their "obstructions" and "boisterous" acts at Duffy Square were the subject of the complaint. Dispelling any question as to the scope of the complaint is the heading, charging the time in question as "4:25 p.m." This was fully twenty minutes after the first police order to the crowd that they disperse and nearly ten minutes after additional policemen were summoned to the scene (20, 165, 209, 218). Defend-

ants' eruption into riotous behavior, it will be recalled, began when the additional police assistance arrived. Unquestionably, then the complaint adequately notified defendants that they were charged with the full extent of their conduct on the day in question.

Thus, the evidence of defendants' behavior after the police ordered the crowd to disperse clearly established their guilt of Section 722, subdivision 2. However, even assuming, incorrectly, that the full extent of their conduct after the dispersal order was not properly before the trial court, and that only the bare fact of refusal to move on was admissible, nevertheless, defendants' guilt of disorderly conduct was still established—under subdivision 3.

Subdivision 3 provides that one who "congregates with others on a public street and refuses to move on when ordered by the police" is guilty of disorderly conduct. As construed by the New York Court of Appeals, only the refusal to obey a reasonable order is punishable, reasonableness being determined by such factors as "protest from pedestrians who were annoyed by the defendants' conduct" [*People* v. *Nixon*, 248 N. Y. 182 (1928)] and interference with vehicular traffic [see *People* v. *Feiner*, 300 N. Y. 291 (1950); *People* v. *Galpern*, 259 N. Y. 279 (1932); *People* v. *Penn*, 16 N. Y. 2d 581 (1965)]. Unquestionably, the police command to the demonstrators at Duffy Square was reasonable. Choking off the pathways of the Square, they spilled into the street seriously interfering with automobile traffic on Broadway and Seventh Avenue. Additionally, pedestrians complained to police officers present. This serious disruption amply justified the police orders to disperse, and defendants' refusal to obey that reasonable command indisputably violated subdivision 3.

Nor is the reasonableness of the police command diminished by the fact that defendants were at the time engaged in a protest meeting within the protection of the First Amendment. The Supreme Court has consistently held that such use of the public streets is subject to reasonable regulation by the state [*Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569 (1940); *Kovacs* v. *Cooper*, 336 U. S. 77 (1948); *Feiner* v. *New York*, 340 U. S. 315 (1951); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana*, 379 U. S. 550 (1965)]. Indeed, extensively discussing this principle in the last mentioned case, the Court, with remarkable prescience, set forth an example of reasonable regulation virtually identical to the facts of the present case:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. *Nor could one*, contrary to traffic regulations, *insist upon a street meeting in the middle of Times*

Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.'' [*Id.* at 554-5 (emphasis added)].

Thus, but for the distance of several blocks, defendants' assembly was an enactment of the Supreme Court's illustration of street activity properly subject to dispersal by the government.

In addition to defendants' clear violation of subdivisions 2 and 3, their unruly, obstructive gathering, shorn of constitutional sanction, indisputably contravened subdivision 4 of the statute by causing "crowds to collect"—on the Square, the street, and the sidewalks of Broadway and Seventh Avenue [see *People* v. *Lennert,* 291 N. Y. 738 (1943); *People* v. *Philips,* 245 N. Y. 401 (1927)].

Misguided is defendants' heavy reliance throughout their brief on *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), in which the Supreme Court reversed breach of the peace convictions based upon defendants' assembling on State House grounds and refusing to obey police orders to disperse. The Court held that there had been "no obstruction of pedestrian or vehicular traffic within the State House grounds. No vehicle was prevented from entering or leaving the horseshoe area'' [*id.* at 231-2]. In sharp contrast is the indisputable evidence of obstruction in the present case.

Additionally, the demonstrators in *Edwards* were prosecuted for a common law breach of the peace, an offense so indefinite as to permit conviction solely upon proof of the "peaceful expression of peaceful views'' [*id.* at 237]. To

the contrary, the New York statute qualifies the common law designation of breach of the peace by statutory subdivisions "evincing a legislative judgment that certain specific conduct be limited or proscribed" [*id.* at 236]. Subdivision 2 of Section 722 is as precise as the statute upheld in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), being "narrowly drawn and limited to define and punish specific conduct lying within the domains of state power" [315 U. S. at 573]. And subdivision 3, as construed by this Court to sanction police commands to disperse issued in the face of pedestrian and vehicular obstruction, not "at the whim of any police officer", is unquestionably constitutional [*Shuttlesworth* v. *Birmingham,* 382 U. S. 87 (1965); also see *Feiner* v. *New York,* 340 U. S. 315 (1951)].

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September, 1966.